

**PANEL 5: SOME NEW IDEAS AND SOME NEW BOTTLES:
TAX AND MINIMUM STANDARDS IN ERISA**

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PANELISTS:

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Regina Jefferson: Okay, if everyone would take their seat we'll begin Panel Five. Panel Five is entitled Some New Ideas and Some New Bottles: Tax and Minimum Standards in ERISA. In this panel, we will be considering some of the policy and interpretive challenges related to the minimum standards of ERISA. I'll turn the mic over to my colleague, Jeremy Gold, who will lead the discussion on funding.

Russell Mueller: We're missing a panel member.

Jeremy Gold: I don't have any questions for anyone except you, Russ.

Russell Mueller: Okay. [Laughter]

Jeremy Gold: By the way, Russ and I, I think, are the only actuaries in the room. Anyone else an actuary? Raise your hand. Good, we can get away with anything now, Russ. You and I were sort of talking about the fact that you're a funding hawk. I'm a funding hawk. You mentioned that there was a way, back when ERISA was created, that we could have had stronger funding rules and in fact they would have been simpler as well. Would you elaborate on that?

Russell Mueller: The Johnson administration of course offered its first opportunity in that area and assets would have to have been

funded over a twenty-year schedule.¹ So whatever liability there was, it was a termination kind of computation and the assets would have had to meet that termination liability level each year. When the House pension task force got around to studying all the cost-of-vesting issues, funding, et cetera, that approach went by the way-side to a large degree because, let's say you had an issue in 1974 that maybe some of us foresaw where if plan assets went down substantially the year before you could see an 80% funded plan fall to 50% funded overnight, and you would fail to meet the standard unless you immediately made up that amount. Well, that could be ten times the amount of the annual contribution ultimately required in ERISA.

So most plans utilized some actuarial method, aggregate method, entry age normal, unit credit, et cetera, and it was our thought that as long as there were some newer, more stringent requirements on actuaries to act on behalf of the plan and plan participants, as opposed to the employer, that we would have reasonable and adequate funding contributions, a range of reasonable contributions that the employer could then choose from.

And by way of background, you asked about this and it's come up in other panels, well what are these DB [defined benefit] plans? Are they tax devices? What are they? Well, you know, I had a background in it. I saw what happened. I valued pension plans before I worked for Congress, and quite frankly there were a number of well-respected actuaries in the profession where they would utilize reasonable assumptions and come up with a suggested range or even a single contribution, say on an entry age normal basis. And the employers would say, "Well, let's see, our stock price has to be here. For that to happen our expense and our cash flow has to be this, so by the way, our contribution has to be this."

Well, actuaries are very good at taking the final answer and working backwards. And of course the ability of the actuary to choose a discount rate was a critical tool here. What we did in the House, we had a simpler way of looking at it. Okay, if the large companies, par-

1. See S. 3421, 90th Cong. § 201(a)(2) (1968). Although this bill was prepared within the executive branch during the Johnson Administration, it was sent to Congress as a proposal of the Department of Labor rather than as an Administration bill. See Remarks of Daniel Halperin, in Panel Discussion, *Setting the Stage: History Before the Ninety-Third Congress*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 265, 272 (2014). Congressman John Dent later adopted this funding standard in the various pension reform bills he introduced. See, e.g., H.R. 2, 93d Cong. § 302(a)(2) (1973) (as introduced Jan. 3, 1973), reprinted in 1 SUBCOMM. ON LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94TH CONG., LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 57-58 (Comm. Print 1976) [hereinafter ERISA LEGISLATIVE HISTORY].

ticularly those who followed a particular funding method, entry age, let's say, in the past, thirty-year amortization, it might look like a couple of large auto and steel companies, but if they hadn't funded adequately over time because they might be dollar-per-year-of-service plans, where every three years the benefits go up, creating a new amount of unfunded liability, you get thirty years for that and if you have a plan top heavy with retirees compared to active workers — then that's wholly inadequate.

The basic problem under ERISA was that if such a plan were terminated, it was going to be inadequately funded. What did we do? We said, "If the funding shortfall is large, you're going to have to put in a contribution every year." But it was an annual redetermination, not a true amortization schedule. Take the value of unfunded vested liabilities and divide that by an annuity certain over fifteen years, when the bill was reported it became twenty years — some pushback there.²

Jeremy Gold: The actuaries at that time who you were trusting with their methods and assumptions were in fact extremely conservative. During the 1970s we had remarkable rises in interest rates after Paul Volcker turned the screws, which then peaked in 1981. So during that time your trust was well-placed. Well, I see by your look perhaps it wasn't, but it might be less well-placed in light of events which came afterwards.

What you were saying is that we relied on actuarial technology and actuaries, who are human beings, to control the flow of funds into the plan, instead of your earlier proposal, which would have tried to control the level of assets by measuring plan liabilities and assets at real value and contributing annually to keep the assets and liabilities in balance.

2. In fact, the fifteen-year formula appears in the reported version of H.R. 2. See H.R. 2, 93d Cong. § 302(b)(2) (as reported by the Educ. and Labor Comm., Oct. 7, 1973), reprinted in 2 ERISA LEGISLATIVE HISTORY, at 2315. The twenty-year formula appears in H.R. 12906, introduced in February 1974. See H.R. 12906, 93d Cong. § 302(b)(2)(C)(i), reprinted in 2 ERISA LEGISLATIVE HISTORY, at 2863. The latter formula was in the House version of H.R. 2, see H.R. 2, 93d Cong. § 302(b)(2)(C)(i) (as passed by House, Feb. 28, 1974), reprinted in 3 ERISA LEGISLATIVE HISTORY 4000, but it was dropped by the conference committee. See Joint Explanatory Statement of the Conference Committee, at 284, reprinted in 3 ERISA LEGISLATIVE HISTORY, at 4551.

Russell Mueller: Yes, and another reason that was dropped, you know, you would have had to keep, in essence, two sets of books as well, so it would have made it much more complicated and unworkable.

Jeremy Gold: –and now we have five or six sets of books. The other significant historical feature was that hedging was in its infancy in 1974. Futures contracts, option contracts—Black-Scholes was only one or two years old. The tools which would have allowed you to use the system where you looked at assets and liabilities weren't all available, because as you pointed out, that relationship was volatile. But if in fact we had used those tools for hedging in the pension area, we could have managed that volatility in funding status.

Using the system we did employ, and following all the minimum funding standards, in 1985 Allis-Chalmers terminated a plan voluntarily with perhaps \$5,000,000 in assets, and \$185,000,000 in liabilities. The next step in ERISA, circa 1990, was that we created the Current Liability concept. It is only under the Pension Protection Act of 2006 [PPA] that we are, in some ways, beginning to get back to what you call the Administration Bill. There the focus was very much on the level of assets and liabilities, and trying to manage those so you don't get Allis-Chalmers who, despite meeting every minimum funding requirement, ends up with \$5,000,000 in assets and \$185,000,000 in liabilities. The world has changed, but I think we are getting towards that very funding idea you had in mind in the Administration Bill.

Russell Mueller: That may be, but quite frankly—and this was something that we tried to follow up under the Multiemployer Act,³ is to use the concept I just talked about, and there was general agreement, among the actuaries anyway, and PBGC [Pension Benefit Guaranty Corporation] and myself and others, that you could have a workable system where the retiree liability was broken apart from the rest and you would fund the retiree part faster than the remaining liability, but in general, the entire aspect of funding could have been totally simplified merely by—and this was a theory, let's say, that could have been put in practice based on a book that Charles Trowbridge, renowned actuary and future president of the Society of Actuaries, had developed—and that is that all you'd have to do is take that unfunded liability and divide it by, let's say, an

3. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980).

annuity certain, let's say in today's context, of seven years. That way you wouldn't be creating fifteen different accounts, et cetera, you'd be re-computing this every year and asymptotically you'd get plan assets up to 100% of vested liabilities in ten years or so. That, in fact, is something that should have been done, could have been done, was discarded, and maybe if you want me to I'll tell you why.

William Bortz: I'm thinking that Regina may want to keep us going and move to areas other than funding.

Regina Jefferson: Actually there was a question in the audience. Judy, I don't know if you wanted to ask your question?

Judy Mazo [from the gallery]: As Bill Bortz has pointed out earlier, getting into a discussion of actuarial methodology is probably not what most people in the room are interested in, but I just want to mention that the methodology in the Multiemployer Act it turns out was applied to maybe three plans. It is irrelevant in actual practice. It has been an interesting theoretical design, but it got overtaken by the faster funding in general.

Jeremy Gold: Before we move either away from funding or to other participants talking about funding, I'll just point out that in the packet you'll find something called *Stopping the Insanity*,⁴ which – it's not as old as ERISA, but it's older than PPA and it really talks about the same idea that you just attributed to Trowbridge. If I'd known that, I would have put Trowbridge's name in the article. By the way, in terms of Judith's comments about actuaries perhaps boring an audience of lawyers, about ten days before President Ford signed ERISA, I was admitted to NYU Law School, and I made a decision at that point, which has benefited lawyers ever since to the extreme consternation of actuaries, not to go to law school but to become an actuary.

Regina Jefferson: Did you want to respond to Judy?

4. Jeremy Gold, *Stopping the Insanity in Pension Funding*, 2003 *CONTINGENCIES* 34, available at <http://www.contingencies.org/sep0ct03/insanity.pdf>.

Russell Mueller: What I was talking about didn't get into the legislation in the first place, unfortunately. And speaking to the reasons thereof, you had to deal with the tax-writing committees. So as I said, the Education and Labor Committee reported such a bill and reported a bill with more stringent requirements with regard to actuaries, rather than just trying to put them in a straightjacket, which has been more and more and more of the case, which has led to higher administration costs, led to employers saying, "Why pay this?" Why? Tax revenue. So the Joint Tax Committee wasn't particularly interested in having increased revenue loss because of higher minimum funding contributions, and secondly, the large industrial employers who had highly underfunded single-employer plans, they also didn't really like the faster funding rules that were in the House bill.

Regina Jefferson: Before we shift our focus to the next topic, I wanted to open the floor for any questions on funding.

Steve Sass [from the gallery]: ERISA introduced employer liability up to 30% of its net worth.⁵ Why wouldn't you consider the employer's obligation up to that net worth to be an asset of the plan? Why wouldn't that be considered? Why just look at the plan's assets and not the employer backup?

Russell Mueller: There is a relationship between funding and employer liability, but while it may not be direct, obviously the faster the funding the less that liability is going to become an accounting issue for a company.

Daniel Halperin: He wants to know why you don't count it as an asset.

Russell Mueller: Why you don't count that as an asset?

Daniel Halperin: The claim against the employer.

Russell Mueller: Well, wouldn't that be kind of a shifting asset? Then that would have to be valued. That issue actually kind of came up in connection with the PBGC premium under Title IV, because in

5. See Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 4062(b)(2) [hereinafter ERISA], which made an employer liable up to 30% of its net worth for unfunded benefits guaranteed by the PBGC.

the Education and Labor bill initially, we didn't deal with one dollar premiums, which was kind of laughable, but the Commerce Department was convinced that—Steve Schanes could tell you more about that if he were here—but was convinced by the business community, “That's all you need to get this program going.”

But the two-part formula where half of the premium would be based on the unfunded liability, and half on just the accrued liability of the plan, would have happened more quickly, if it had been actually implemented. And PBGC we said may do it, they just never did it, but Congress would have to approve it and there was just tremendous pushback to do more in that premium area, to make plan sponsors more responsible and responsive to more adequate funding.

William Bortz: On the particular question you asked, if you were to include 30% of the employer's net worth as an asset of the plan as it were, an asset that stands behind the pension obligation, you get what I've heard some people call a countercyclical situation. Namely, once the employer gets in trouble, you now have increased contributions required to the plan, thus accelerating the employer's decline, so that you get a cycle that causes employers to implode very quickly.

Jeremy Gold: Allis-Chalmers happily reported it had a slightly negative net worth at the time it terminated the plan. Russ, the PBGC often asks for its own authority in setting premiums and it's just as frequently turned down by Congress. Do you have any thoughts on whether Congress is making the right choice there?

Russell Mueller: Well, I thought we had probably as adequate a framework in the original law⁶ if it actually had been implemented because it would have provided for some incentive for sponsors of underfunded plans to fund, and it would split the, you know, premium base so that those that were much better funded, their assets wouldn't have to be transferred to the underfunded as much. So I

6. ERISA called for single-employer plans initially to pay a premium of \$1 per participant and multiemployer plans a premium of 50¢ per participant. *See* ERISA, *supra* note 5, § 4006(a)(3). After two years, however, the PBGC was authorized to set premiums partly on the basis of a plan's guaranteed benefits that were not funded and partly on the basis of the plan's total guaranteed benefits, whether or not those benefits were funded. *Id.* § 4006(a)(5).

thought anyway that that got through our committee, so the unions thought that wasn't a bad thing to do. I don't know who Murray Latimer did his actuarial work for at the time, but he didn't raise an objection to it.⁷

Regina Jefferson: I think I saw one question, yes, Jack.

Jack Sheehan [from the gallery]: I have one question with two parts to it. I want to ask about premiums paid to the PBGC. Hardly any conversation was given during the time of the legislation to the ridiculously low premium that was paid, but in subsequent years Congress got involved with kicking that up and risk-related premiums. And just as an observation, I found that unions that completely supported the earlier bill started splitting away from the increasing of the premiums. You might want to comment on that. I know in our steel industry, the companies were saying that the premiums had gone too high, so you might want to comment a little bit on that. And the other point that came up in—

Russell Mueller: I can only remember one part at a time at my age. [Laughter]

Jack Sheehan [from the gallery]: I did remember the second question. [Laughter] Another question that Congress passed on. When a plan was overfunded and the question arose, whose assets are these?

Russell Mueller: The question of asset reversions, the gentleman's— was that a concern in—

Jack Sheehan [from the gallery]: Who did that money belong to? I don't know what an actuary would say as to who those funds belong to.

Russell Mueller: Well, I don't know what some actuaries might say, but in the House bill we said it's the employees'— or plan participants', unless there's a specific provision in the plan allowing for a reversion after all accrued liabilities had been paid, and so that if an inadvertent, say, overfunded situation had occurred that the employer would not be "penalized."

7. Murray W. Latimer was the actuary for the United Steelworkers union.

But you raise some issues: what are defined benefit pension plans? And we had a journalist, he said, "They're compensation."⁸ Well, guess what, you know, both the unions, as you know, and employers, as I know, consider it compensation, so that's why they want to come up with a particular number. That's compensation going to that group of employees with regard to that defined benefit pension plan, and they don't want it to exceed a certain amount, and they want to make sure that whatever that amount is, it is something that's going to be acceptable on their cash balance statement and their accounting statement and so the reversion portion of it is to bring that back in balance if, in fact, there's an overfunded situation. And believe me —

Jack Sheehan [from the gallery]: But you had to terminate the plan in order to —

Russell Mueller: Yes, you had to terminate the plan, no ongoing reversions allowed. There were a number of well-funded pension plans, particularly in one industry, a lot of them located in Texas, and so that issue was put over because of particular senators from that state until much later. The whole asset reversion issue was pushed off, pushed off, pushed off until a satisfactory solution could be obtained from all the parties, and of course those particular companies did get their reversions in time. See, I told you I can't remember what the first question was, but it was important.

Jack Sheehan [from the gallery]: You already answered it.

Jeremy Gold: Somewhere in that question was PBGC premiums. About ten years ago I had lunch with Steve Kandarian [Executive Director of the PBGC]. He pointed out to me that he and I could agree on anything on the menu as long as the guy at some other table was going to pay for it and that that was a fundamental principle of negotiation.

I see the same thing in a bipartisan context, every time we see a bipartisan pension bill. I see Messrs. Portman and Cardin ten years

8. See Remarks of David Cay Johnston, in Panel Discussion, *Keynote: Other Perspectives*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 341, 346 (2014).

ago, they were always happy to bring something that called for less funding. That made the employers happy and it made the employees happy and the burden fell on the PBGC, who wasn't in the conversation. We now have Congressmen Charlie Dent (R-Penn.) and

Ron Kind (D-Wis.), and MAP-21⁹ which, a year ago, "paid for" a highway bill by lowering required contributions to defined benefit pension plans (thus lowering tax deductions and raising revenue). The poor PBGC is left essentially having to be its own lobby without support from either party.

Regina Jefferson: Okay. Actually, the only reason I'm taking it away is I was looking at the clock. Yes?

David Cay Johnston [from the gallery]: Fannie Mae and Freddie Mac just announced in the last hour that they're getting rid of their pension plans.¹⁰

Russell Mueller: DB [defined benefit] plans.

Regina Jefferson: Thank you for that update. At this point we will shift our focus to other minimum standards relating to back loading and normal retirement age and we'll ask Bill Bortz to lead the discussion on that.

William Bortz: The first question I wanted to ask was to either one of you, the vesting protections for pension plans, not for defined contribution, are based on the accrued benefit, which leaves open the question sort of: what's left out of the vesting protections? And the biggest element that's sort of well-known is early retirement subsidies. What was the thought process? Particularly since the ultimate result was a strange mix: although they're left out of the vesting, they're also left out of the PBGC guarantee system, but they were protected before and after ERISA to the extent of funding and they are protected explicitly today by the Section 411(d)(6) anti-cutback rules.¹¹

9. Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405 (2012).

10. See Jonathan Stempel & Dan Grebler, *Fannie Mae, Freddie Mac End Traditional Pension Plans*, THOMSON REUTERS (Oct. 25, 2013), <http://www.reuters.com/article/2013/10/25/us-fanniemaefreddie-mac-pensionplans-idUSBRE99O12P20131025>.

11. 26 U.S.C. § 411 (2012).

Daniel Halperin: At least at the time that I was involved, I don't recall any discussion of that at all, so the question is, did we think they'd be included and it was not necessary to say so, or did we intend to deliberately leave them out? I hope it was the former, but I don't really remember.

Russell Mueller: Well, the PBGC originally did have a separate fund for these plant shutdown benefits, for example, or benefits that were not considered non-forfeitable under the statute and subject to the vesting standards. So, those were items that were addressed and they were addressed in that way, but the vesting standards were not particularly targeted at what were then called ancillary benefits. They were considered part of ancillary benefits, and I think in IRS lore, I think they were ancillary benefits as well, that didn't have to be, you know, specifically accounted for. An actuary could say, "Well, we'll add five percent to the cost for ancillary benefits."

Regina Jefferson: Yes, question from the audience.

Karin Feldman [from the gallery]: Bill, I am troubled by your premise that the PBGC doesn't guarantee early retirement benefits.

William Bortz: No, early retirement subsidies.

Karin Feldman [from the gallery]: But the PBGC doesn't do subsidies for anyone, right? When you say subsidies, you're saying that if the age is below normal retirement age, they reduce benefits. But if you were below the max for your age, you still get—for example, if I have a thirty-year subsidized early retirement benefit.

William Bortz: I am going to have to refer that question to others.

Israel Goldowitz [from the gallery]: It's getting a bit weedy out there. I know the answer but—

Karin Feldman [from the gallery]: Izzy, you know the answer?

Israel Goldowitz [from the gallery]: But you might want to distinguish between the early retirement benefit, the shutdown benefit that has vested, and the social security supplement.

Karin Feldman [from the gallery]: I purposely stayed away from the shutdown benefit.

William Bortz: Well, the right way the ERISA rules were enacted, the anti-cutback rules prevented taking away the early retirement subsidies.¹² Because they don't have to meet the vesting rules, you can condition an early retirement subsidy on someone having twenty years of service. But once someone has accrued a right to it, you can't cut it back at that stage. And including what you say – namely, if there's a service and age condition, you can require the person at any given time to continue their service to ultimately get it, but they have the right to get it even if you were to try to eliminate it.

Karin Feldman [from the gallery]: Right, and it got even stronger protection under the Retirement Equity Act¹³ except for certain supplements. And the IRS has issued guidance under Section 411(d)(6) that protect shutdown benefits and some other benefits.

William Bortz: Yeah, but not the vesting rules. That's only the anti-cutback rules. So I was asking them if they had worried about the vesting rules. It was an interesting mix because they're protected under the anti-cutback rules, and particularly after the Retirement Equity Act, but they're not protected under the vesting rules. That's an odd combination.

Karin Feldman [from the gallery]: The vesting was for benefits at normal retirement age.

William Bortz: Right, but my question is why that choice?

Jack Sheehan [from the gallery]: What was the final answer to the shutdown benefits? Are they protected?

Karin Feldman [from the gallery]: By the PBGC? Absolutely, Jack. How many Steelworkers are getting them?

12. See T.D. 2007-1 C.B. 501.

13. Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) (amending various provisions of 29 U.S.C. §§ 1001-1401 (1984)).

Jack Sheehan [from the gallery]: I just hadn't heard the answer to the question.

William Bortz: The plant shutdown benefit depends on exactly what category they're in. If they're early retirement subsidies, for example, that apply to the plant shutdown, then if the plant is actually shut down, the people are entitled to them as they are to any other benefits. If the plant hasn't been shut down before the plan is terminated, they don't ever get them.

Daniel Halperin: Bill, do you think that you could draw a distinction in terms of what people should normally be relying on so if you're sitting there at age thirty or age thirty-five, are you thinking, "Well, I'm planning to retire at age fifty and they've got an early retirement subsidy in this plan"? And, "That's the way I'm thinking and I ought to vest in that just as I would in my normal retirement benefit," or do we tend to think that people just aren't thinking that far ahead, they're not thinking about plant shutdowns, that they're not thinking about separating early or at least the employer does not have to—we don't have to protect them against that. I don't know if you can draw that kind of a line, but if you wanted to think about it that's what you'd have to do.

William Bortz: When you were describing originally the vesting and sort of why it was important¹⁴—why it was so unfair of someone to be required to work fifteen years and never get anything if they happened to leave—it seemed like that same logic would have applied to the other retirement subsidy contexts, even though it's not.

Daniel Halperin: Unless, in a sense employee expectations are different as to the two of them. And, you know, I've never actually thought about that from that context before, and I'm sure I didn't think about it in 1968.

14. Halperin, *Setting the Stage*, *supra* note 1, at 283–84.

Jeremy Gold: The early retirement subsidy has a very long vesting schedule, sometimes taking thirty years.

William Bortz: Just another question here on the tax end, I guess it's tax, the provisions are in both—and that is—the backloading rules, they're both in ERISA as well as the tax law, but the interpretation has been left to the IRS. My understanding is those came out of Treasury.

Daniel Halperin: I actually found when I flipped through some of my papers, a memorandum written in November of 1967, which describes the backloading rules pretty much as they were enacted. I think I wrote the memo, but I might have been copying somebody else. [Laughter] I don't really know, but yes, they did come in that far back.

William Bortz: And why don't they apply after normal retirement age?

Daniel Halperin: You're again asking me something that I couldn't possibly remember. [Laughter]

Jeremy Gold: Probably nobody thought of that. Would you think that's right?

William Bortz: Sort of the follow-up question is nobody thought of ridiculously low normal retirement ages, which is sort of one place where one worries about it.

Daniel Halperin: Well, I think we thought normal retirement age meant normal retirement age. But you're right, you've got a number of questions here about how people played around with normal retirement age. I'm absolutely sure nobody thought about that.

William Bortz: But that leads me now to my sort of follow-up question on these, and that is: are there things you would have done differently with respect to the vesting and sort of the accrual and the backloading rules in light of how people have pushed the envelope? [Laughter]

Russell Mueller: If you'd have told us in 1974 how they were going to push the envelope a couple of decades later, we would have had an answer. [Laughter]

Daniel Halperin: Bill, I think you're much more able to answer that question than I am. I haven't done this stuff in forever.

Regina Jefferson: One more question.

Karin Feldman [from the gallery]: I guess I'm thinking about the questions, Bill, that you're asking. In 1974, when ERISA was passed, under the Age Discrimination and Employment Act,¹⁵ you could force people to retire at 65, you could stop benefit accruals under the plan. I mean, aren't those rules written in that context and again another situation where nobody's imagining that the world's going to change and you have to work until you die in order to retire?

Daniel Halperin: I think that's true.

Russell Mueller: Yes.

Regina Jefferson: All right. Any other questions from the audience before we move to the next topic? The next topic we wanted to address is tax issues. I'd like to ask Dan questions about some of the tax issues. One relates to the changing pension climate to the extent that we shifted from DB [defined benefit] to DC [defined contribution], I wondered how tax concerns have changed today?

Daniel Halperin: I don't think they've changed very much. Somebody pointed out earlier that ERISA did not lead to greater coverage in retirement plans and the answer, of course, was it wasn't intended to.¹⁶ People recognized that very little was happening in terms of coverage. I mean, you did have, obviously, vesting rules, you could get better coverage and so does eligibility rules and there were a few other nits in the law, part-timers I think got some benefits, but for the most part there wasn't. And, certainly it was recognized that if you made the rules tougher, you'd have fewer

15. 29 U.S.C. § 621 (2012).

16. Remarks of Damon Silvers, in Panel Discussion, *Making Sausage: The Ninety-Third Congress and ERISA*, in Symposium, *ERISA at 40: What Were They Thinking?*, 6 DREXEL L. REV. 291, 313-14 (2014).

plans and therefore, the fact that some plans terminated as a result of ERISA, was not unexpected. It was expected.

So, if you're saying was ERISA saying, "Boy, we've got a tough situation here, half the world has no coverage, we better do something about it." That wasn't the focus. The focus was saying, "You can promise whatever you want, but if you promise it, you got to deliver it." That, I think, is how I would describe ERISA. So, I would say that the major issue today is coverage and the major issue has been coverage forever. And we haven't made a heck of a lot of progress. We've made some. The rules are certainly better than they once were, which is another reason why you have fewer plans perhaps, and as Frank pointed out, if the tax rates are lower, the tax incentive is smaller, and if we have 415 limitations,¹⁷ the amount that you give to the high paid is much less than you used to be able to, and you've got to give more to the low paid, so again, that leads to the situation where you're likely to get fewer plans. So you have this trade off. If you want to protect people, if you want to make a promise real, employers in certain circumstances are going to say, "I'm not going to do it."

As I've been writing for a number of years, and other people have as well, you need a better way, you need another way if you're going to get coverage. You're not going to get it through the qualified plan system as we now see it. I still believe that. I think we should have tougher discrimination rules, like I have been saying, we should have coverage for everybody, at least everybody in the line of business with no classifications. We could have shorter vesting rules. We should tighten up on integration and not allow it unless people have an excess benefit; and we should do something about 401(k) plans and requiring at least some mandatory contributions in all 401(k) plans. But if you did that and did nothing else you're going to have fewer plans, so you've got to be prepared to do something else. It was mentioned earlier that in 1980 the Carter Commission recommended MUPS, or Mandatory Universal Pension System. That went nowhere. We have some ideas along the same lines today and I think that's where the focus has to be.

Russell Mueller: I think all the coverage issues really came about post-ERISA. ERISA was remedial, as Dan said, and there were bills after that trying to address the coverage issue. One, introduced by Congressman John Erlenborn and the ranking person on the Ways & Means would have required employers to offer at least a DC plan

17. 26 U.S.C. § 415 (2012).

and allow those employees to contribute their own contributions without mandating a particular employer contribution. This preceded the whole 401(k) situation, however, so those rules were just general on the theory that if it's there, people will come.

Daniel Halperin: Going back to your question on DB versus DC, I think we probably didn't pay enough attention to the fact that DB plans, which I think are terrific—final pay DB Plans are terrific if you have one job for your last thirty years of employment, or twenty-five years of employment. They're not so good for people who keep changing jobs. And I think in that sense a shift to DC is better, at least if we can get DCs with some sort of protection against a declining market. But anyway, it's certainly better in terms of coverage, which suggests to me that benefits testing is just something that we should not allow. We should go to testing on the basis of contributions, with possible exceptions for a true final pay defined benefit plan, and that we ought to have also rules tightening up on how you determine the accrued benefit in the case of early separation.

And I think that makes a difference. But I think, you know, particularly in small companies, if we let them have both a pension plan and a profit sharing plan, we've cut back on the combined-plan rules, and the rules for contributions if you have two plans and they can test both of them on a benefits basis, and that is just a ridiculous situation. We're just wasting money there that could be used in a more beneficial way.

Jeremy Gold: It sounds to me as though you can have pretty much your whole wish list in an expansion of Social Security.

Daniel Halperin: Unquestionably, it's better.

Jeremy Gold: Right? You get everything you just asked for, except we can't get it politically.

Daniel Halperin: Well, that's what I've been saying. Yes, it's better, we can't get it.

Jeremy Gold: Along with the rest of your wish list that you can't get.

Daniel Halperin: Why are we going to get it if it's not Social Security? If we called things by different names you get less opposition.

Regina Jefferson: I see three questions in the audience, Karen?

Karen Ferguson [from the gallery]: Okay, I just wanted to pick up on something that Dan said. It's not directly responsive to the question, but I think it's interesting for oral history purposes, which is integration. My understanding is that the law that Congress passed, enacted by both the House and the Senate, eliminated pension integration and that it was only put back in the technical amendments that were written after the law was passed.

Daniel Halperin: You're talking about ERISA?

Russell Mueller: She's talking about a provision that froze further integration under pension plans¹⁸ that then was passed—it's in my little green volume here of the Conference Report, my gold-embossed edition, and there was a technical change that in the enrollment process that passed both the House and Senate that undid the freeze. Bob Nagle could maybe add some more to that.

Robert Nagle [from the gallery]: I believe it was something that the staff of the Joint Tax Committee sort of did on their own. I'm not sure. I think this was an issue that they felt very strongly about, particularly Larry Woodworth, and I believe that may have been his one miscalculation in all of this. I think he felt it could be slipped in and no one would notice. Well, very wrong. Many business interests were closely following all this stuff and a storm of objection almost immediately erupted.

Russell Mueller: Yes.

Robert Nagle [from the gallery]: — and so, this Technical Corrections bill¹⁹ — which also fixed some other glitches — but that was its main purpose, was adopted just before the now amended final version was passed.

18. H.R. Rep. No. 93-1280, at 131-32 (§ 1021(g)), *reprinted in* 3 ERISA LEGISLATIVE HISTORY 4405-06.

19. H. Con. Res. 609, 93d Cong., § 2(17) (1974), *reprinted in* 3 ERISA LEGISLATIVE HISTORY 4727.

David Cay Johnston [from the gallery]: Let me ask a question about how we might align the interests of the janitors and the CEOs. We set a maximum for the tax issues with about a quarter million dollars of annual compensation in calculating benefits. That covers more than 99% of all workers, but it excludes all the senior executives, who therefore no longer have an interest financially in the DB plan. What if we had a rule that said: "You can have any amount you want. If your salary's \$100,000,000 a year, we'll provide you with a pension so long as it's on exactly the same formula as every other employee gets." Why don't we do that to restore the common interest of the CEO and the janitor?

Daniel Halperin: That repeals 415.²⁰ Well, that's what the law was pre-ERISA.

David Cay Johnston [from the gallery]: Right. What's wrong with the idea?

Daniel Halperin: The real question is: how much do you have to give to rich people in order to get retirement coverage for the rank and file?

David Cay Johnston [from the gallery]: But you're not really giving rich people anything if you do that, because when they take the money out they're going to pay taxes on it.

Daniel Halperin: Oh, yes you do, you give them a tax-free buildup.

Russell Mueller: Yes.

Daniel Halperin: The advantage is a tax-free buildup, and the tax-free buildup on \$20,000,000 a year is a lot more than the tax-free buildup on \$250,000 a year.

Jeremy Gold: The buildup takes place *inside* the plan.

20. 26 U.S.C. § 415.

William Bortz: It's all compounding, it's all compounding.

Daniel Halperin: You're giving them something. Yeah, of course, people have said, you know, when we raise the limits, "Raise the limits, you'll get more plans." As I said before, the more generous the plan is to the higher paid, the more they can afford to include low-paid people who are not interested in the whole thing and won't take a salary cut, at least if they have another job opportunity that they can go to without a pension plan. The more you raise the benefits to the high paid, the more likely a plan will exist but I think at some point you've got to say, "That is really a stupid way to do things." And it may be the only way to do things, and it may be we cannot increase Social Security and we may decide that retirement coverage for rank and file people is so important that we can pay for it by making the rich even richer—but personally, I don't want to live in a country that thinks that way.

Frank Cummings: Over the years there was a turning point it seems to me about somewhere in the '90s. I guess, it used to be that when I had a change in a plan or something like that and I would go in to the company and see their Senior Vice President for benefits, or the CFO, or someone like that, and describe the change that was in line. The first thing he would do would be to ask—surprise—"What do I get out of this?"

The yellow pad would come out and he would figure out—before he even talked about any of the low-paid, he wanted to know what he got out of it. Starting I think in about the mid '90s, that question was no longer asked because senior executives are not interested in qualified plans, they're interested tangentially, but that's not where the action is, it's all 409A,²¹ it's all nonqualified deferred compensation, it's all short term take the money and run and once you've destroyed the interest in the plan of the guy who is administering the plan, you can forget the plan.

Daniel Halperin: But you're assuming that the plan has no benefit to the company in terms of employee retention and employee recruiting and everything else.

Well, you know, he's not getting anything out of the salaries he's paying to the low-paid people but presumably he recognizes he has to pay them. So the question is: Is paying them in the form of pensions as productive as paying them in the form of cash? And the

21. 26 U.S.C. § 409A (2012).

problem is that it isn't, that people don't value them as much and that's the difficulty we're facing. There's not an easy way out of that, but I think that's what you're saying. The fact that he's not getting anything out of the plan I don't think is particularly relevant, unless you're saying in the old days these plans were really stupid from the point of view of the company because they didn't allow them to cut wages by as much as their contributions to the plan because the employees didn't value them. But the CEO is getting so much extra out of it that nobody notices, because it didn't really appear on the proxy statements that they favored the plan. They were willing to put in the plan from that perspective because they were benefitting in a way that they couldn't benefit from straight salary because it would be more visible, and that's not true anymore, so they don't do that.

I think you've got to have a view of the world, I just don't know enough of what goes on there to answer.

Scott Macey [from the gallery]: From the executive's point of view, nonqualified comp still defers his tax. So economically, the question you've got here is this: Is any consideration given, or should it be given, to conditioning the nonqualified deferred executive compensation on the existence of comparable benefits for employees?

Daniel Halperin: That's something that Karen Ferguson has talked about a lot and I've talked about it with her a lot and I think there's something to be said for that. What you're saying is that from the executive's point of view, nonqualified compensation is as good as qualified compensation because he gets a deferral and he also gets a pre-tax rate of return because the corporation swallows the taxes.

But that means the corporation is raising his pay and, you know, my colleagues that deal with executive compensation say that that's one of the reasons we have a lot of nonqualified compensation, because you can hide what the executive is getting, but I understand the disclosure rules have gotten better, it's not as hidden as it once was. So what it is, it's a raise in pay. They could raise the pay by giving him more current compensation. If they can raise the pay more by giving him nonqualified deferred compensation because it

doesn't get the same salience from shareholders, that's certainly a problem, but that seems to be a problem for a different audience.

Scott Macey [from the gallery]: But you might get the tax deferral with nonqualified compensation, but you don't get the benefit security of a defined benefit plan if the corporation becomes insolvent.

David Cay Johnston [from the gallery]: In theory. But in the real world, the workers get wiped out and the executives in non-qualified plans get their money.

Daniel Halperin: We have 409A that makes that harder, but I'm not so convinced that it's—you know, you have a situation where neither the company or the executive is interested in the fact that there isn't that security. I mean, the company is not interested in not giving him the money, and he's not interested of course in not getting it. In that world, I kind of figure they'll figure a way around it, but I think it's certainly true, 409A is supposed to say: "You've got to give up the security if you want to get benefits."

Scott Macey [from the gallery]: Another approach, though, would be to allow the nonqualified plans to be funded, to protect them against creditors if they used the same formula as the qualified plan. You'd have to have some rules to make sure they weren't taking advantage, but some executives would like that and they would fund the plans.

Daniel Halperin: Personally, I have not ever been against the funding and giving up security. I mean, what you're saying basically is you want to get away with something you've got to take some risk. And so, you know, is that sensible? I mean, do they end up taking the risk and they get the benefits they're looking for and a few guys are out of luck, or—

Scott Macey [from the gallery]: I actually went to Congress twenty-five years ago on behalf of some clients, that is, if they kept the qualified plan overfunded—so everyone had the benefit of full funding—would it be reasonable to allow the executive benefits to be funded from the plan to the extent of the overfunding. If it ever fell below the full funding, they would lose out. It would give an incentive to fully fund the qualified plan.

Daniel Halperin: You know, when we put in 457²² when I was in the Treasury in 1978 and it applied at that time to governments only and then in '86 it was extended to tax exempts. My suggestion, which came over from the Treasury, is allow them to fund it. And the Joint Committee Staff said, "Absolutely not."

Regina Jefferson: Norman.

Norman Stein: I just wanted to sort of challenge two bits of the conventional wisdom. First, that the limits will result in a lot more plans. We had the Portman-Cardin legislation,²³ which raised the limits, but so far as I know, there was no increase in plans when that happened. And second, the idea that executives don't care anymore about the qualified defined benefit plan. We recently saw the introduction of QSERPS [Qualified Supplemental Executive Retirement Plans], which used qualified plans to pay extra benefits for just a handful of really senior executives and these people who were making more money than Midas still were interested in using the plan that supposedly they're not interested in anymore to increase their benefits by a few thousand dollars a year where they could do it without raising the benefits for lower paid employees. So I'm not sure that a lot of chief executive officers and other higher ranking officials in corporations aren't at least somewhat following and somewhat interested in their defined benefit plan and I don't really think it matters all that much what the limits are unless, as Dan says, they're a \$20,000,000 defined benefit per year or something and I think the tax costs of that would be just prohibitive.

Jeremy Gold: I think Dan struck exactly the right issue here. The raising of the limits, including the executives, is most effective on the margin in the slightest way. The real question is: are these plans attractive to the executive as steward of his shareholder interest in

22. 26 U.S.C. § 457 (2012).

23. The reference is to the Comprehensive Retirement Security and Pension Reform Act, H.R. 10, 107th Cong. (2001), which proposed significant increases to the benefit and contribution limits for qualified plans. *See id.* § 201. These and other provisions of H.R. 10 were included in the Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38 (2001), available at <http://beta.congress.gov/bill/107th-congress/house-bill/10> (last visited May 29, 2014).

the business? And once upon a time they were and now they are not. And there are many rules that have made that happen, but the ability to manage your workforce using a defined benefit plan has diminished and of course the lack of portability has also punished these final average DB plans so that they are less attractive. We don't actually want to train a twenty-five-year-old and then get thirty-five years of service out of him anymore. We now prefer to train them, get ten years of service, and find a new twenty-five-year-old. None of whom are in this room. [Laughter]

Regina Jefferson: Okay, well with that we will conclude Panel Five. I'd like to ask you to join me in giving our panel a round of applause.